IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b))
Description of case

Writ Petition No.1021 (M/B) 2003

Date of decision: 14th November, 2003

For the approval of:-

Hon'ble Chief Justice S.H. Kapadia.

Hon'ble Mr. Justice M. M. Ghildiyal, J.

- Whether the order/judgment should be sent to the reports for reporting? (Yes)

- Whether the reports be allowed to see the judgment ? (Yes)

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IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 1021 (M/B) 2003

Umesh Sharma,
S/o Shri Shiv Nandan Sharma,
Sabhasad Nagar Nigam,
Dehradun. ……. Petitioner

Versus

1. State Election Commissioner,
   Uttaranchal, Dehradun.
2. District Election Officer/
   District Magistrate, Dehradun.
3. Returning Officer/
   Additional District Magistrate, Dehradun.
4. Rajesh Sharma S/o late Kunwar Sen,
   Sabhasad, Nagar Nigam, Dehradun
5. Sagar Singh, S/o Miken Singh,
   Sabhasad, Nagar Nigam, Dehradun. ……. Respondents.

Mr. V.K. Bist, Mr. Alok Singh, Mr. Gopal Narain & Mr. A. Rab, Advocates for the Petitioner.
Mr. S. Dhilia, Advocate for respondent No. 1 & 2.
Mr. Arvind Vashishth, Advocate for respondent No. 2.
Mr. A.K. Sharma, Advocate for respondent No. 5.
Mr. N.B. Tewari, learned Chief Standing Counsel.

Coram: **Hon'ble S.H. Kapadia, C.J.,**
Hon'ble M.M. Ghildiyal, J.

Date: 14th November, 2003

ORAL JUDGMENT: [Per Hon'ble S.H. Kapadia,C.J.]

1. By this writ petition, Umesh Sharma, petitioner, who contested the elections of Upa Nagar Pramukh for Nagar Nigam, Dehradun has challenged the order dated 4th October 2003 passed by the Returning Officer / Additional District Magistrate, Dehradun as also the order dated 22nd October 2003 passed by State Election Commissioner, Uttaranchal, Dehradun.

2. FACTS:

On 19th September 2003, State Election Commissioner issued Instructions to the Returning Officer in the matter of election to the post of Upa Nagar Pramukh, Nagar Nigam, Dehradun. Schedule 5

contained instructions for determination of the result. It defined the expressions **Continuing Candidate; First Preference; Next Available Preference; Unexhausted Paper and Exhausted Paper.** Under clause 19 of the Instructions, it was stipulated that at the end of the counting and determination of the result, the District Election Officer shall inform the result to the Commissioner and after seeking his permission, the result shall be declared.

On 3rd October 2003 elections were held. In the First Round, petitioner secured 17 preference votes, Rajesh Sharma, respondent No. 4 secured 18 preference votes and Sagar Singh, respondent No. 5 secured 16 preference votes. Respondent No. 5 got eliminated in the First Round as he had secured lowest number of votes. In this case, we are concerned with system of proportional representation by means of single transferable votes by ballot. It is not in dispute that the requisite quota fixed was 26 votes. In the First Round, none of the candidates secured the quota. The ballot papers of Sagar Singh were recounted in order to ascertain Second Preference votes, In the Second Round, petitioner got in all 20 votes (17 original plus 3 being transferred votes). On the other hand, Rajesh Sharma, respondent No. 4, in the Second Round, did not secure any transferred votes and consequently, his total remained at 18, which represented the original votes of the First Round.

In short, the result for the post of Upa Nagar Pramukh, Election 2003 for Nagar Nigam, Dehradun is indicated by the Chart, hereinbelow, reproduced:

S. No.	**Name of candidate**	**Votes secured in first count**	**Votes secured after First exclusion**	**Sum of Col. 3 & 4**	**Votes secured after Second exclusion**	**Sum of Col. 5 & 6**	**Votes secured after Col. 7 & 8**	**Sum of Col. 7 & 8**	**Votes secured after Fourth exclusion**	**Sum of Col. 9 & 10**
1	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**
1	Umesh Sharma	17	3	20						
2	Rajesh Sharma	18	-	18						
3	Sagar Singh	16								
Total Number of Exhaust Vote:			**After the first count, Sagar Singh secured lowest number of votes thus he was excluded and only 3 votes of second preference from his votes were credited to Umesh Sharma**							

On 3rd October 2003, District Election Officer votes a letter to the State Election Commission stating that results could not be declared as none of the candidates had secured the requisite quota of 26 votes. The opinion was sought under the above Instruction No. 19. By letter dated 3rd October 2003, the State Election Commissioner asked the District Election Officer to go through the judgment of the Supreme Court in the case of Jaidrath Singh & another V/s Jivendra Kumar & other reported in 2000 (3) SCC 154 and passed appropriate orders in the light of the said judgment. Consequently, the impugned order was passed on 4th October 2003 by the Returning Officer stating that since none of the candidates had secured 26 votes, it was not possible to declare any candidate as duly elected. On 5th October 2003, petitioner moved a representation to the State Election Commission, inter alia, calling upon State Election Commission to give appropriate instructions to the Returning Officer under Instruction 19 and to declare the petitioner as duly elected as he had secured more votes than any other candidate though the petitioner had secured less than 26 votes. By the impugned order dated 22nd October 2003 passed by the State Election Commission, the petitioner's representation was rejected. Therefore, the present writ petition has been filed.

3. <u>BRIEF HISTORY OF VARIOUS ENACTMENTS:</u>

On 1st June 1993, part IX-A came to be introduced in the Constitution of India by 74th Amendment Act, 1992 with effect from 1st June 1993. Consequently, Article 243 ZA came to be inserted. After 74th Amendment to the Constitution sections 45 & 46 of U.P. Nagar Nigam Adhiniyam, 1959 came to be amended. Article 243 ZA and sections 45 and 46 as amended are quoted below:

> **"243-ZA. Elections to the Municipalites.-** (1) The superintendence, direction and control of the preparation of electoral rolls for, and the couduct, of all elections to the Municipalities shall be vested in the State Election Commission referred to in article 243K.

(2) Subjection to provisions of the Constitution, the Legislature of a State may, be law, make provision with respect to all matters relating to, or in connection with, elections to the Municipalities.

Section 45 superintendence etc. of the conduct of elections.-

[(1) The superintendence, direction and control of the conduct of elections of the Nagar Pramukh, Up Nagar Pramukh and Sabhasads of the corporation shall be vested in the State Election Commission.]

[(2) Subject to sub-section (1) the Chief Election Officer (Urban Local Bodies), referred to in sub-section (2) of Section 39, shall supervise the conduct of the elections of the Nagar Pramukh, Up Nagar Pramukh and Sabhasads of the Corporation.]

46. Other regarding conduct of elections.- In so far as provision with respect to any matter is not made by this Act, (the State Election Commission) may, by order, provide for matters concerning conduct of elections to the offices of Nagar Pramukh and Up Nagar Pramukh and to the seats of [* * *] Sabhasads that is to say-

(a) [* * *][33]

(b) the appointment, power and duties of Nirvachan Adhikaris (Returning Officers). Sahayak Nirvachan Adhikaris (Assistant Returning Officers) Nirvachan Adhyakshas (Presiding Officers) and Matdan Ahikaris (Polling Officers) and clerks.

(c) appointment of dates for nomination, security, withdrawal and polling;

(d) the manner of presentation and the requirements for valid nomination scrutiny of nominations and withdrawal of candidatures;

(e) appointment and duties of election agents, polling agents and counting agents;

(f) procedure at general elections including death of candidate before poll, procedure in contested and uncontested elections;
[* * *][34]

(g) identification of voters;

(h) hours of polling;

(i) adjournment of poll and fresh poll;

(j) manner of voting at elections;

(k) scrutiny and counting of votes including recount of votes and procedure to be followed in case of equality of votes and declaration of results;

(l) the notification of the names of the persons elected as Sabhasads [35] [* * *] Nagar Pramukh and Up Nagar Pramukh.

(m) Refund and forfeiture of deposits;

(n) Manner in which votes are to be given by Nirvachan Adhyaksha (Presiding Officer), polling agent or any other person who being an elector for a ward is appointed for duty at

a polling station at which he is not entitled to votes;

(o) The procedure to be followed in respect of the tender of vote by person representing himself to be an elector after another person has voted as such elector;

(p) The safe custody of ballot boxes, ballot papers and other election papers, the period for which such papers shall be preserved and the inspection and production of such papers;

(q) [* * *][36]

(r) issue of copies of election papers and fixing of charges for such copies;

(s) maintaining of list of [37][Electorates referred to in sub-section (3) of Section 12] [38][* * *] for the purposes of [39][elections of] [40][* * *]

(f) generally on all matters relating to conduct of elections.

From the perusal of Article 243 ZA read with sections 45 & 46 of U.P. Nagar Nigam Adhiniyam, 1959 as amended, it is clear that State Election Commission is the only authority to conduct, supervise and control municipal elections and that the State Election Commission is the only authority, who could give directions in that regard. Accordingly, in this case, the State Election Commission gave instructions to the Returning Officer (District Election Officer, respondent No. 3 vide letter dated 19th September 2003 containing Instruction No. 19. We may also mention that with the introduction of

Article 243 ZA in the Constitution of India and after the 74th Amendment Act, U.P. Nagar Mahapalika Adhiniyam, 1959 became U.P. Nagar Nigam Adhiniyam, 1959.

There is one more aspect, which needs to be mentioned. Schedule 5 to the Instructions issued by the State Election Commission, in this case dated 19th September 2003 is identical to U.P. Kshetriya Panchayat and Zila Panchayat Election Rules 1994 (Scheduled II) framed under U.P. Kshetriya Panchayat & ZP Act, 1961.

4. SCOPE OF SCHEDULE 5:-

In this case, we are concerned with counting of votes, where one seat is to be filled. In this case, we are not concerned with counting of votes, where more than one seat is to be filled.

For the purposes of determination of the issues involved in this writ petition, Schedule 5 needs to be interpreted. Schedule 5 refers to determination of the results. Clause 1(1) defines the expression **Continuing Candidate** to mean any candidate not elected and not excluded from the poll at any given time. Under clause 1(2) the expression **First Preference** is defined to mean figure 1 mentioned opposite the name of any candidate, whereas the expression **Second Preference** is defined to mean figure 2 mentioned opposite the name of any candidate and so on & so forth. Under clause 1(3) the expression **Next Available Preference** is defined to mean subsequent preference recorded in consecutive numerical order for a continuing candidate. Under clause 1(4) the expression **Unexhausted Paper** is defined to mean a ballot paper, on which further preference is recorded for a continuing candidate. Under clause 1(5) the expression **Exhausted Paper** is defined to mean a ballot paper on which no further preference is recorded for a continuing candidate. Under clause 2 the Returning Officer is directed to ascertain the number of First Preference votes (original votes) secured by each candidate and give credit to him for that number. Under clause 3, fixation of quota is stipulated. A formula is prescribed. In this case, quota is fixed at 26 votes.

For the purposes of deciding this writ petition, clauses 4, 5 & 6 of the Instructions, as applicable to the facts of this case, needs to be quoted:

"4. A. If there are only two candidates then-

(a) If one candidate gets larger number of first preference votes than the other, declare the former as elected, or

(b) If both the candidates get equal number of first preference votes, exclude one of them by drawing of lot and declare the other as elected.

B. If there are more than two candidates then-

(a) If one of them is found to secure first preference votes equal to or more than the quota determined under instruction no. 3, declare him as elected, or

(b) If none of the candidates secures first preference votes equal to more than the quota aforesaid, proceed according to the instruction hereinafter taking into consideration second and subsequent preference as may be necessary.

5. If at the end of the first or any subsequent count the total number of votes credited to any candidate is equal to, or greater than the quota, or there is only one continuing candidate, that candidate can be declared elected.

6. If at the end of any count, no candidate can be declared elected-

(a) Exclude the candidate who up to that stage has been credited with the lowest number of votes;

(b) Examine all the ballot papers in his parcel and sub-parcels according to the next available preferences recorded thereon for the continuing candidates, count the number of votes in each such sub-parcel and credit it to the candidate for whom such

preference is recorded, transfer the sub-parcel to that candidate and make a separate sub-parcel of all the exhausted papers, and

(c) See whether any of the continuing candidates has, after such transfer and credit, secured the quota.

If, when a candidate has to be exclude under clause(a) above two or more candidates have been credited with the same number of votes and stand lowest on the poll, exclude that candidate who had secured the lowest number of first preference votes, and if that number also was the same in the case of two or more candidates, decide by lot which of them shall be excluded.

All the sub-parcels of exhausted papers preferred to in clause (b) above shall be set apart as finally dealt with and the votes recorded thereon shall not thereafter be taken into account."

In the Instructions, the State Election Commission has also given an illustration, which demonstrates how Rule 4, 5 & 6 of the Instructions are to be applied. The said illustration is quoted below:

"Illustration- Suppose there are four candidates A, B, C and D and the number of first preference votes secured by them are-

A	=	12
B	=	11
C	=	7
D	=	5
		35

The quota will be -35/2 + 1 = 18

No candidate have obtained votes equal to or over the quota at the first count, the candidate having the lowest votes, namely, D will be excluded.

Suppose there are second preference marked on only four ballot papers in the parcel of D as below:

A	=	2
B	=	2

The fifth ballot paper will be placed in the sub-parcel of exhausted papers and the two papers recording second preference for A and B each will be placed in separate sub-parcels for A and B each of them will credited with two additional votes. The votes for A, B and C will now be :

A	=	12+2
B	=	11+2
C	=	7

Since at the end of the second count no candidate can be declared elected, the candidate C having the lowest votes out three continuing candidate will now be excluded and the votes will be transferred to other continuing candidates A and B.

Suppose second preferences are recorded in all the ballot papers in the parcel of C and are as below:

A	=	4
B	=	3

After crediting A and B with these additional A would have votes secured 18 votes, that is, equal to the quota and B 16 votes. A will therefore be declared elected."

The above Instructions No. 1, 4, 5 & 6 of Schedule 5 are similar to Rule 71 and Rule 75 of the Conduct of Election Rules 1961. For the sake of convenience Rule 71 and Rule 75 are quoted hereinbelow:

"71. Definitions.- In this Part:-

(1) "*continuing candidate*" means any candidate not elected and not excluded from the poll at any given time;

(2) "*count*" means

(a) all the operations involved in the counting of the first preferences recorded for candidates; or

(b) all the operations involved in the transfer of the surplus of an elected candidate; or

(c) all the operations, involved, in the transfer of the total value of votes of an excluded candidate;

(3) "exhausted paper" means a ballot paper on which no further preference is recorded for a continuing candidates, provided that a paper shall also be deemed to have become exhausted whenever-

(a) the names of two or more candidates, whether continuing or not, are marked with the same figure and are next in order of preference; or

(b) the name of the candidate next in order of preference, whether continuing or not, is marked by a figure not following consecutively after some other figure on the ballot paper or by two or more figures;

(4) *"first preference"* means the figure 1 set opposite the name of a candidate; *"second preference"* means the figure 2 set opposite the name of a candidate, *"third preference"* means the figure 3 set opposite the name of a candidate; and so on;

(5) "original vote", in relation to any candidate, means a vote derived from a ballot paper on which a first preference is recorded, for such candidate;

(6) *"surplus"* means the number by which the value of the votes, original and transferred, of any candidate exceeds the quota;

(7) *"transferred vote"* in relation to any candidate, means a vote the value or the part of the value of which is credited to such candidate and which is derived from a ballot paper on which a second or a subsequent preference is recorded for such candidate; and

(8) *"unexhausted paper"* means a ballot paper on which a further preference is recorded for a continuing candidate.

75. Counting of votes where only one seat is to be filled-

(1) At any election where only one seat is to be filled, every valid ballot paper shall be deemed to be of the value of 1 at each count, and the quota sufficient to secure the return of a candidate at the election shall be determined as follows:

(a) add the values credited to all the candidates under clause (c) of rule 74.

(b) divide the total by 2; and

(c) add I to the quotient ignoring the remainder, if any and the resulting number is the quota.

(2) If, at the end of the first or any subsequent count, the total value of the ballot papers credited to any candidate is equal to, or greater than, the quota or there is only one continuing candidate, that candidate shall be declared elected.

(3) If, at the end of any count, no candidate can be declared elected, the returning officer shall –

(a) exclude from the poll the candidate who up to that stage has been credited with the lowest value;

(b) examine all the ballot papers in his parcels and sub-parcels, arrange the unexhausted papers in sub-parcels according to the next available preferences recorded thereon for the continuing candidates, count the number of papers in each such sub-parcel and credit it to the candidate for whom such preference is recorded, transfer the sub-parcel to that candidate and make a separate sub-parcel of all the exhausted papers; and

(c) see whether any of the continuing candidates has, after such transfer and credit, secured the quota.

(4) If, when a candidate has to be excluded under clause (a) of sub-rule (3), two or more candidates have been credited with the same value and stand lowest on the poll, the candidate for whom the lowest number of original votes are recorded shall be excluded, and if this number also is the same in the case of two

or more candidates, the returning officer shall decide by lot which of them shall be excluded,"

In this case, we are concerned with the elections of Upa Nagar Pramukh for Nagar Nigam, Dehradun. Section 12(3) of U.P. Nagar Mahapalika Adhiniyam, 1959 (now known as U.P. Nagar Nigam Adhiniyam, 1959) reads as under:-

"12. Election of Nagar Pramukh and Upa Nagar Pramukh –

(3) The Nagar Pramukh and the Upa Nagar Pramukh shall be elected by the members in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot."

5. <u>ISSUES:</u>

There issues are required to be decided in this petition. They are as follows:-

a. Whether the Returning Officer was right in his conclusion "that declaration of any of the candidate to be elected is not possible" in view of the judgment of the Supreme Court in the case of Jaidrath Singh V/s Jivendra Kumar & others reported in 2000 (3) SCC 154?

b. Whether the present writ petition is liable to be dismissed for not exhausting alternative remedy by way of raising Election Dispute?

c. Whether this Court can, in facts and circumstances of the case, give directions to the State Election Commission at this stage of the matter namely when fresh elections are yet to be notified?

6. <u>Concept of Proportional Representation by means of single transferable vote by ballot:</u>

As stated above, section 12(3) of U.P. Nagar Mahapalika Adhiniyam, 1959 (now known as U.P. Nagar Nigam Adhiniyam, 1959), inter alia, states that elections of Mayor and Deputy Mayor

shall be in accordance with the system of Proportional Representation by means of single transferable vote and the voting at such election shall be by secret ballot. In this case, we are concerned with election to the post of Deputy Mayor (Upa Nagar Pramukh), Nagar Nigam, Dehradun.

In the case of Poona University V/s S.N. Agashe reported in A.I.R. 1971 Supreme Court 1783, the concept of "Election by Proportional Representation by means of single transferable vote by ballot" has been explained. In this connection, para 11 of the said judgment reads as follows:-

> "11. Election by proportional representation by means of a single transferable vote by ballot is often described as the Hare system of proportional representation named after the English Political reformer Thomas Hare. This system of election is based on a quota determined by the following formula. The total votes cast is divided by the number of seats to be filled plus one, and one is added to the quotient. If 1000,000 votes are cast and 4 seats are to be filled, divide by 5 to get a quotient of 20,000, then add 1 to get 20,001, which is the quota. A candidate receiving the quota of first-choice of votes is elected. Under this system electors express first, second, third or additional choices according to the number of candidates. An elector does not waste his vote. If the candidate for whom he has expressed his choice, does not need his vote, the surplus votes are distributed in accordance with the indicated second choices among candidates whose quotas have not been filled. If enough candidates are not elected by this process the candidates with the smallest number of choices is then excluded and his votes are distributed in the same way. This process of exclusion or elimination goes on until enough candidates have filled their quotas or until the successive eliminations have left no more than enough to fill the vacancies."

Reading of paragraph 11 of the above judgment of the Apex Court indicates that under the system of Proportional Representation by means of a single transferable vote by ballot, a candidate receiving the quota of original votes (First Preference votes) is elected. Under the system voters are required to express First, Second, Third or additional choices according to the number of candidates. If the candidate, for whom a voter has expressed his choice, does not need his votes, the surplus votes are distributed as per the second choice. If enough candidates are not elected by this process, then the candidate with the smallest number of choice is eliminated and his votes are distributed in the same way for the next round. This process of elimination has to go on until enough candidates have filled their quota or until successive eliminations have left no more than enough to fill the vacancies.

In the case of Poona University V/s Agashe, elections were held on 9th May 1970 to the post of Vice Chanceloor of Poona University. The total number of votes tendered was 149. One vote was invalid. The valid votes were 148. The election was in accordance with the system of Proportional Representation by means of single transferable vote by ballot. The result of the ballot papers was as follows:-

"Dr. Apte secured 58 original votes.

Principal Kulkarni secured 37 original votes.

Principal Suru secured 53 original votes."

Pricnipal Kulkarni got eliminated on the first count as he had secured lowest number of original votes. Eight of the voters had given original votes to Principal Kulkarni, but they had not exercised second preference eith in favour of Dr. Apte or in favour of Principal Suru. However, the remaining 29 voters gave 12 second preference votes to Dr. Apte and 17 second preference votes were given to Principal Suru. This resulted in a tie because both the continuing candidates Dr. Apte (58+12) and Principal Suru (53+17) each secured 70 votes on the second count. As there was a tie in the second count, Dr. Apte was declared elected because in the first count

Dr. Apte had secured 58 original votes as against 53 original votes secured by Principal Suru. This was challenged.

We have given the facts of Poona University case (supra) for two reasons. Firstly, it indicates the manner in which votes should be counted under the system of Proportional Representation by means of single transferable vote by ballot. The case of Poona University (supra) was a case of counting of votes where one seat was to be filled. Secondly, the above facts in the case of Poona University (supra) show that difficulties in declaring results normally arise in cases where two or more continuing candidates secure equal number of votes. However, in our case, that is not the position. The judgment of the Supreme Court in Poona University's case (supra) is relied upon by us because it explains the meaning of the words "Election by Proportional Representation by means of single transferable vote by ballot." It also indicates that under the system of Proportional Representation by means of single transferable vote by ballot, the idea of Quota and the rule of Elimination are in-built. The judgment of the Supreme Court in Poona University's case (supra) further shows that the rule of Elimination should be continuously applied till the candidates fill their quota or until successive eliminations leave behind **one continuing candidate,** which would be enough to fill the vacancy. In other words, the Returning Officer should go on from one Round to the other, in terms of first preference votes second preference votes, third preference votes etc., till the quota is reached or till successive eliminations leave enough candidates to fill the vacancies. Our reasoning in this regard is also supported by the illustration given in Schedule 5 quoted above. We may point out that if by rule of Successive Elimination ultimately for one seat if only one candidate remains, then that candidate has to be declared elected. The judgment of the Supreme Court in Poona University's case (supra) is also important because it lays down that the concept of Proportional Representation by means of single transferable vote by ballot is also enshrined in Rule 6 in the Schedule to the Presidential and Vice-Presidential Election Rules, in Statute No. 158 of the Poona

University and also under Rule 75 of the Conduct of Election Rules, 1961. The above system of election also contemplates fixation of quota, which in this case was 26 votes. Therefore, the concept of Quota and the concept of Rule of Elimination are both in-built in the system of election by Proportional Representation by means of single transferable vote by ballot. The object is to see that votes do not get wasted. It is important to note that under the above system, votes would not get wasted because the transferred votes, which are carried forward from first count to the second count and so on, are added to the original votes. However, in case of tie, there might be a dead-lock. In our case, there is no such tie. Therefore, the Returning Officer was required to go down the line, try to ascertain whether any candidate fills the quota or apply the rule of Successive Elimination till one candidate remains to fill-in one vacancy. We may clarify that if there were two vacancies and if by rule of Elimination two candidates would remain, then they could be declared elected even if there was no quota. This is the concept of election by Proportional Representation by means of single transferable vote by ballot.

We have discussed this judgment in extensio because we are of the view that the judgment of the Supreme Court in the case of Jaidrath Singh & another V/s Jivendra Kumar & others reported in 2000 (3) SCC 154 is not applicable as in that case also there was a tie in the second count as in the case of Poona University V/s Agashe (supra).

7. <u>Issue No. (a)</u>

Whether the Returning Officer was right in his conclusion "that declaration of any candidate to be elected is not possible" in view of the judgment of the Supreme Court in the case of Jaidrath Singh & another V/s Jivendra Kumar & others reported in 2000 (3) S.C.C. 154?

<u>Arguments:</u>

Mr. Alok Singh, learned Advocate for the petitioner submitted that the Returning Officer was wrong in passing the impugned order dated 4th October 2003 by placing reliance on the judgment of the

Supreme Court in the case of Jaidarth Singh (supra). He argued that the judgment of the Supreme Court in Jaidarth Singh's case (supra) was not applicable because in that case, in the first count, Jivendra secured 10 preference votes, Manvendra secured 14 preference votes and Gayatri secured 7 preference votes. In the first count, Gayatri was eliminated as she secured lowest number of original votes. Therefore, the second preference votes on her ballot papers were considered for the second count, in which Jivendra secured 10 plus 5 votes, whereas Manvendra secured 14 plus 1 votes. Consequently, in the second round, there was a tie. Therefore, the argument was that Jivendra should be eliminated because in the first round he had secured 10 original votes whereas Manvendra had secured 14 original votes. In reply, it was argued that even if Jivendra was eliminated, Manvendra could not be declared elected as he had also not secured the quota. Mr. Alok Singh, contended that Schedule II of U.P. Zila Parishad Election of Adhyaksh and Upa Adhyaksha Rules, 1963 is identical to Schedule 5 (containing instructions issued by State Election Commission in this case). On this point, there is no dispute. Mr. Alok Singh, learned Advocate for the petitioner, contended that the Judgment of the Supreme Court was not applicable to the facts of this case as there was a tie in that matter, which is not so in the present case. He further contended that under clause 5 of the Instructions contained in Schedule 5, it is stipulated, inter alia, that if at the end of the first count or in subsequent count, the total number of votes credited to any candidate is equal to or greater than the quota or if there is only one continuing candidate then that candidate should be declared elected. Mr. Alok Singh contended that the important expression in Rule 5 as application to the facts of this case is "that there is only one continuing candidate". He contended that this expression has not been construed by the judgment of the Supreme Court in Jaidarth's case (supra). He contended that in this case, even if there was no quota, clause 5 contemplates that the candidate, who secures the quota or in its absence, the last remaining continuing candidate vis-à-vis the vacancy would be entitled to be declared

elected. He contended that in this case there was no tie. He contended that in the circumstances the addition of the transferred votes should have been continued till the quota was reached or till one continuing remaining candidate remained in the field. He contended that the election was only for one seat for which there candidates competed. He, therefore, submitted that the Returning Officer was wrong in relying upon the judgment of the Supreme Court in Jaidrath Singh's case (supra).

Mr. Dhulia, learned counsel appearing on behalf of the State Election Commission, contended on this point that the judgment of the Supreme Court in Jaidarth Singh's case (supra) was squarely applicable. He submitted that under section 12(3) of the U.P. Nagar Mahapalika Ahiniiyam, 1959, the Mayor and Deputy Mayor was required to be elected by the members in accordance with the system of Proportional Representation by means of single transferable vote by ballot. He contended that the concept of Quota, in the above system, was relevant. He submitted that in the above judgment of the Supreme Court it has been held that no candidate could be declared elected unless the secures the quota. He contended that in the present case although there was no tie, none of the candidates had secured 26 votes representing the quota. He, therefore, submitted that the judgment of the Supreme Court in Jaidrath Singh's case (supra) was squarely applicable. In this connection he placed reliance also on clause 4, 5 & 6 of the above Instructions.

Findings on Issue No. (a):

The central issue in this controversy is: Whether the Returning Officer was right in his conclusion that declaration of any of the three candidates was not possible? He has relied upon the judgment of the Supreme Court in Jaidrath Singh's case (supra). We are of the view that the Supreme Court's judgment in Jaidrath Singh's case (supra) is not applicable. Firstly, in our view the system of Proportional Representation by means of single transferable vote by ballot needs to be understood. It has been explained by the Supreme Court in Poona University's case (supra). It contemplates Quota and also Rule of

Elimination. The object is to save each vote from being wasted. The object of the system is to undertake counting of votes in each count/ round till either the quota is attained or by rule of Elimination, the left-over candidates in the fray are enough to fill vacancies. In either case, the votes do not get wasted. It ensures results of an election. The said system does not only rely upon quota. It also provides for an alternative. This alternative contemplates rule of Elimination by which the remaining candidates would be sufficient to fill the vacancies. Secondly, it is important to note that elections under this system is by Proportional Representation by means of single transferable vote by ballot. As could be seen from the illustration quoted above, when one of the four candidates is eliminated in the first count, the second preference indicated on his ballot papers (transferred votes) is added to the continuing candidates in the second count and so on and so forth. This is because under the above system, election is by Proportional Representation by means of single transferable vote by ballot. In the case of tie, the system partly fails because there is no carry-forward of the transferred votes for the next count and that is why the Supreme Court in the above judgment in the case of Jaidrath Singh (supra) ultimately took the view that casual vacancy in the office of Adhyaksh stood created. In the present case, that is not the situation. There is no tie. Therefore, the judgment of the Supreme Court in Jaidrath Singh's case (supra) has no application. Even in the case of Poona University (supra), there was a tie in the second round. We are relying upon the judgment of the Supreme Court in Poona University's case as that judgment defines the meaning of the words "Election by Proportional Representation by means of single transferable vote by ballot." It is indicated in para 11 of the judgment of Poona University (supra). It is that system, which squarely applied to the facts of the present case as in the present case, there is no tie at any stage. Therefore, the Returning Officer as well as the State Election Commission was wrong in coming to the conclusion that declaration of any of the candidates to be elected is

not possible in view of the judgment of the Supreme Court in Jaidrath Singh's case (supra).

Therefore, issue No. 'a' mentioned above is answered in the negative that is in favour of the petitioner and against the Returning Officer's decision. Therefore, the issue is answered in favour of the petitioner. In the circumstances the impugned order dated 4th October 2003 passed by the Returning Officer and the order passed by State Election Commission dated 22nd October 2003 are set aside.

8. Issue No. (b)

Whether the present writ petition is liable to be dismissed as not maintainable and for not exhausting alternate remedy by way of raising Election Dispute?

Arguments:

Mr. Dhulia, learned counsel for the State Election Commission, contended that by reason of the impugned orders dated 4th October 2003 and 22nd October 2003, results have been declared. He submitted that in this case, by the impugned order dated 4th October 2003, the Returning Officer has come to the conclusion that declaration of any of the candidates to be elected is not possible and therefore, a casual vacancy had arisen. He, therefore, contended that this amounts a declaration of results and if he petition is aggrieved by such declaration, the petitioner should be directed to exhaust the alternative remedy of raising an Election Dispute. Mr. Dhuila contended that the dispute raised in the present petition concerns "electoral matters." He relied upon two judgments of the Supreme Court in support of his contention namely A.I.R. 1978 Supreme Court 851; Mohinder Singh Gill & another V/s Chief Election Commissioner & others and N.P. Ponnuswami V/s The Returning Officer & others reported in A.I.R. (39) 1952 Supreme Court 64. He contended that issuance of writ under Article 226 of the Constitution would amount to interference in the election process. He, therefore, contended that writ petition was not maintainable under Article 226 of the Constitution. He contended that State Election Commission was a constitutional authority. He contended that the decision of the

Returning Officer was delivered as a part of the election process. He contended that when casual vacancy arises, the only alternative is to go for fresh elections. He argued that the Returning Officer was the sole arbitrator, who had taken the decision based on law laid down by the Apex Court. He contended that under section 61 of the U.P. Nagar Mahapalika Adhiniyam, 1959 election of Upa Nagar Pramukh can be questioned by election petition by three category of persons namely unsuccessful candidate any person whose nomination paper is rejected or any sabhasad of the Mahapalika. He argued that in this case, an election petition has been filed by a Sabhasad before the District Judge, Dehradun. He contended that under Article 243 ZG of the Constitution, there is an express bar to interference by courts in electoral matters. He contended that Article 243 ZG is in pari materia to Article 329 of the Constitution. He contended that the word "Election" under Article 329 (B) has been construed by the Apex court in the case of M.S. Gill (supra). That the word "Election" has been defined to mean the entire election process which begins with the notification of the election and which ends with the declaration of result and therefore, a remedy is provided to the unsuccessful candidate to move by way of election petition before the District Judge. That the petition has failed to avail that remedy under Statute and therefore, the writ petition was not maintainable.

Per contra, Mr. Alok Singh, learned Advocate for the petitioner argued that in this case, till date, the election process is not over. That fresh elections have not been notified. He, further contended that under section 61 of U.P. Nagar Nigam Adhiniyam, 1959 election of a person as a Deputy Mayor / Mayor could be questioned by unsuccessful candidate or by any person whose nomination paper is rejected or by any member of Mahapalika. However, in this case, all the three candidates are unsuccessful and therefore, section 61 of the said Act 1959 has no applicaation. He also relied upon section 71 of the said Act, 1959 which gives grounds for declaring an election to be void. He contended that under section 71 of the said Act 1959, the District Judge is empowered to declare the election of the returned

candidate to be void. He contended that in the present case, there is no returned candidate. He contended that even the grounds in section 71 of the Act do not cover the issue, which arises in the present case. He, therefore, submitted that the writ petition was maintainable under Article 226 of the Constitution. Mr. Alok Singh, further contended that in this case, the petitioner seeks to challenge the order of the Returning Officer who has come to the conclusion that declaration of any of the candidates to be elected is not possible on wrong reading of the judgment of the Supreme Court in Jaidrath Singh's case (supra). He, therefore, contended that this case is a peculiar case in which the dispute does not relate to any of the electoral matters and therefore, the writ petition was maintainable under Article 226 of the Constitution.

Findings on Issue No. (b):

On the above arguments, the short point which arises for consideration is whether on facts and circumstances of this case, are we entering upon the prohibited area of Electoral Matters? In this case, before the elections, the State Election Commission had issued instructions vide letter No. 640/SEC-2/422/2003 dated 19th September 2003 to the District Election Officer, Dehradun (respondent No. 2). Under clause 19 of the Instructions, District Election Officer was required to inform about the results of the counting to the State Election Commission and only after seeking permission from the Commission, the results were to be declared. Further, under Article 243 ZA of the Constitution of India, superintendence, direction and control in the matter of preparation of electoral rolls and in the matter of the conduct of all elections to the municipalities is vested in the State Election Commission constituted under Article 243 K. As submitted on behalf of the State Election Commission, the word "Election" covers the entire election process beginning with notification of the election and ending with the declaration of the results. This position is clear if one reads Articles 324, 327, 328 and 329. In short, during the election process, the courts do not have to

interfere. However, if the Returning Officer / District Election Officer comes across a bottleneck in counting of votes and declaring results, opinion / guidance can be sought by them from the State Election Commission. In this case, before passing the impugned order, the Returning Officer sought clarification / instructions from State Election Officer and he was told to read and apply the judgment of the Supreme Court in the case of Jaidrath Singh (supra), which as stated above, is not applicable. This kind of dispute is not a dispute concerning any of the electoral matters. Although the petitioner has asked for a winder relief, we are not inclined go grant the wider relief of declaring the results. Declaration of results cannot come within this Court's jurisdiction under Article 226 of the Constitution. However, it is the constitutional duty of this Court to expedite the election process and to clarify the legal position particularly in cases where there is a miss-reading of the judgment of the Apex Court. In the case of Mohinder Singh Gill & another V/s Chief Election Commissioner & others reported in A.I.R. 1978 Supreme Court 851, the entire case law in electoral matters has been discussed. However, in paras 28 and 29 of that judgment, it has been observed that there are two types of decisions over the years, the first relates to proceedings which interfere with the progress of election, whereas the second accelerates the completion of the election and they act in furtherance of an election. We have undertaken this exercise to clarify the legal position so that the election could be expedited and re-election/ fresh elections involving huge expenditure could be obviated. In the present case, we are not deciding any issues touching election. In this case, we are only clarifying that the judgment of the Supreme Court in Jaidrath Singh's case (supra) is not applicable and that the reliance placed by the Returning Officer on that judgment is miss-conceived. As stated above, the impugned order is passed by the Returning Officer stating that declaration of any of the candidates to be elected is not possible in view of the judgment of the Supreme Court in Jaidrath Singh's case, is erroneous as that judgment does not apply to the facts of this case. Once this ground is clear, it is for the State

Election Commission to give appropriate directions to the Returning Officer through District Election Officer on above situation so that results could be declared in accordance with law. By our judgment, we have only clarified that on the facts and circumstances of the case, the above judgment of the Supreme Court in Jaidrath Singh's case (supra) is not applicable and therefore, the matter needs to be decided by the Returning Officer dehors te above judgment of the Supreme Court in Jaidrath Singh's case (supra). It was the duty of the State Election Commission to guide the Returning Officer in this regard during election process, particularly when the Returning Officer through respondent No. 2 had sought guidance. This is the mandate of Article 243 ZA of the Constitution. The State Election Officer has to supervise, direct and control the conduct of all elections to the municipalities under Article 243 ZA. Hence, we are directing the State Election Commission to issue appropriate instructions to the Returning Officer on the above situation to enable the Returning Officer to take decision in accordance with law dehors the judgment of the Supreme Court in Jaidrath Singh's case. We may also mention one more reason for entertaining this petition. As laid down by the Supreme Court in the case of Poona University (supra), the object of the above system of Proportional Representation by means of single transferable vote by ballot is to obviate wastage of votes and holding of re-elections / fresh elections, which involve considerable expenses. Since, the judgment of the Supreme Court in Jaidrath Singh's case is not applicable, we have undertaken this exercise under Article 226 of the Constitution keeping in view the objects of Proportional Representation by means of single transferable vote by ballot as laid down in the case of Poona University (supra). By this exercise, we are also avoiding ensuing delay on account of the impugned decision of the Returning Officer as the seat is vacant from 3rd October 2003. Accordingly, we hold that the writ petition was maintainable in the light of the facts and circumstances of this case. It is maintainable only in exceptional limited cases as an exception and not as a rule.

9. **Issue No. (c)**

Whether this Court was entitled to give directions to State Election Commission at this stage of the matter particularly when fresh elections are yet to be notified?

As stated above, the issue involved in this case does not touch upon any of the items, constituting electoral matter. Fresh elections are yet to be notified. Before passing the impugned order, the Returning Officer had sought the opinion of the State Election Commission. The Returning Officer was asked to read the judgment of the Supreme Court in Jaidrath Singh's case. Hence, the Returning Officer applied that judgment. As stated above, the Supreme Court's Judgment is not applicable. We have directed, therefore, the State Election Commission to give directions to the Returning Officer to remove the deadlock in accordance with law without placing reliance on the above judgment of the Supreme Court, which has no application to the facts of this case. Since, fresh elections are yet to be declared, there was no bar as far as this Court is concerned for issuing appropriate writ under Article 226 of the Constitution. Accordingly, we have issued the appropriate directions.

10. In this case, we are not required to examine the scope of section 61 and 71 of U.P. Nagar Mahapalika Adhiniyam 1959, as in this case, we are of the view that a limited issue is involved namely non-applicability of the judgment of the Supreme Court in the case of Jaidrath Singh (supra) on the basis of which the impugned orders have been passed. In the circumstances, even assuming for the sake of arguments that on this point in issue, election dispute was maintainable, still on facts and circumstances, we have interfered under Article 226 of the Constitution as an exceptional measure in order to expedite the election process without any further delay.

11. Before concluding, we may point out that the above reasons have been given by us only to only to support our conclusion that the judgment of the Supreme Court in Jaidrath Singh's case was not

applicable to the present case. Declaration of results will not come within the purview of this judgment. That function has to be discharged by the Returning Officer subject to Instructions from State Election Commission. Declaration of results, therefore, will be the sole prerogative of the Returning Officer, who will decide the matter in the light of the Instructions on above situation from State Election Commission and in accordance with law.

12. Accordingly, we pass the following order:-

ORDER

The impugned order passed by the Returning Officer dated 4th October 2003 and the impugned order passed by the State Election Commission dated 22nd October 2003 are set aside with a direction to the State Election Commission to issue appropriate instruction to the Returning Officer through District Election Officer to determine the result of the election held on 3rd October 2003 in accordance with law. The State Election Commission will issue directions within one week from the receipt of this Order. While doing so, the State Election Commission will give instructions / guidelines to the Returning Officer dehors the judgment of the Supreme Court in Jaidrath Singh's case, which as stated above, has no application to the facts of this case. In the light of the instructions from the State Election Commission, the Returning Officer will determine the results in accordance with law.

Writ petition is accordingly disposed of. No order as to costs.

(M.M. Ghildiyal, J.) **(S.H. Kapadia, C.J.)**

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